

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MOSHI
AT MOSHI**

MISC. LAND APPLICATION NO. 31 OF 2021

(C/F Land Appeal No. 25/2020 High Court)

JULIUS L. LYIMO APPLICANT

VERSUS

DAINESS A. KAWISHE 1ST RESPONDENT

RAPHAEL M. TEMU 2ND RESPONDENT

20/4/2022 & 26/5/2022

RULING

MWENEMPAZI, J:

The applicant has approached this court with an application praying for an order to enlarge time within which to file an application for leave to appeal to the Court of Appeal out of time against the decision of this court in Land Appeal No. 25 of 2020 (Hon. B.R. Mutungi, Judge) delivered on 20th November, 2020. He is also praying for any other relief this Honourable court may deem it just to grant.

The application is supported with the affidavit of Julius L. Lyimo, the applicant herein. In it the deponent has stated that the applicant was the applicant in Land Application No. 109/2017 in the District Land and Housing Tribunal and the appellant in the Land Appeal No. 250/2020. In the latter appeal, he was aggrieved by the decision of this court (Hon. B.R.

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Mutungi, Judge) and filed a Notice of Intention to Appeal to the Court of Appeal of Tanzania on the 14th December 2020.

Due to health problems he instructed his lawyer to file an application for leave to Appeal to the Court of Appeal. His lawyer did not file the said application and the applicant did not know about the fact. However, he came to know that his lawyer did not file the application when he was served with the summons to show cause why execution of Land Application No. 109/2017 should not be carried out. In the course of following up the execution that is when he realized that his lawyer did not file the application for leave to appeal to the Court of Appeal.

The deponent alleges under paragraph 6 of the affidavit that he is still sick, and he works far from Moshi the fact which has made it difficult to make follow up on what is happening at court premises.

On their part the respondents have filed their counter affidavit which has been deposed to by Mr. Gideon Mushi, their advocate. In paragraphs 4,5,6, and 7, it is deposed that the respondents filed an application for execution after the lapse for time to appeal. Though there was a Notice of appeal by the applicant, nothing has been done to file the appeal. By the time this application was filed, nine (9) months had lapsed. According to the deposition, the reasons of sickness are an afterthought since the applicant had already instructed his lawyer who did not work for the appeal. On this the applicant did not make any follow-up to see to it that his lawyer had already filed the appeal. The deponent has stated that the medical reports do not reflect the reasons for delay as the same were issued between 2005

and 2014, which time is far before commencement of the case in the trial tribunal.

At the hearing the applicant was served by Mr. Emmanuel Pascal Karia, learned advocate and the respondents were served by Mr. Gideon Mushi, learned advocate. Hearing was by way of written submissions.

The counsel for the applicant has submitted in the applicant's submission in chief that it is a requirement of law that if a party is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may appeal to the Court of Appeal with leave of the High Court or Court of Appeal. This is according to Section 47(2) of the Land Disputes Courts Act Cap. 216 R.E. 2019. According to Rule 45(a) of the Court of Appeal Rules, where an appeal lies with leave of the High Court, and application for leave may be made informally when the decision against which it is desired to appeal is given or by chamber summons according to the practice of the High Court within thirty days of the decisions.

However, where time has already lapsed the High Court or where an appeal lies from a subordinate court concerned, may extend the time for giving notice of intention to appeal from the judgment of the High Court or the subordinate court concerned. This is made under Section 11(1) of the **Appellate jurisdiction Act, Cap. 141 R.E. 2019.**

The counsel for the applicant has submitted further that it is this court that has the powers to extend the time upon the expiry of prescribed time when moved properly with sufficient cause having proper arguments and

legal back up. He has cited the case of **Regional Manager, TANROADS Kagera vs Ruaha concrete company Ltd, Civil Application No. 96 of 2007, CAT at Dar es Salaam** where the Court of Appeal held that:

*"What constitutes **sufficient reason** cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means the applicant must place before the court material which will move the court to exercise its judicial discretion in order to extend the time limited by the Rules"*

The counsel for the applicant has also cited cases of **Dar es Salaam City Council vs. Jayantilal P. Rajani, Court of Appeal of Tanzania, Civil Application No. 27 of 1987** and **Tanga Cement Company Ltd vs. Jumanne D. Massangwa and Amos A. Mwalanda, Civil Application No. 6 of 2001**, for the argument that the sufficient explanation for delay and that the sufficient cause should not be narrowly interpreted respectively. The sufficient cause must be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power of control or influence resulting in the delay in taking step to file application on time.

The applicant in this case gave notice of appeal on 14/12/2020. He also instructed his former lawyer so that he may file the appeal but the appeal was not filed in time and he could not realize the application for leave to appeal has not been filed until when the notice to show cause as to why execution should not proceed was issued to him. The reason advanced for

not following up is sickness. Medical reports have been attached to the affidavit. It is the argument by the counsel for the applicant that sickness is a good cause for delay. He has cited the case of **Nelson Mrema & 413 others vs. Kilimanjaro Textiles corporation & another, Civil Reference No. 2 of 2005; Court of Appeal of Tanzania at Dar es Salaam** wherein the reason of sickness was considered to be a sufficient cause for one to be granted an extension of time.

The Respondents' counsel has vigorously opposed to the application. He first prayed for the counter affidavit to be adopted and form part of the written submission. The counsel proposed three issues to be answered in tackling the submission in chief. One is whether the applicant advanced sufficient cause and or reason for delay.

In the opinion of the counsel for the Respondents, for an order of extension of time to be issued by the court, there must be sufficient reasons advanced to the court. Though the court is empowered to extend time under Section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, still the execution is not arbitrarily made. Section 14(1) of Law of Limitation Act Cap. 89 R.E. 2019 requires there be sufficient reasons. He has drawn the attention of this court to the case of **Barenga Mungozi vs Mary Ntanzwe [2002] TLR 141** where in it was held that:

"The court has discretion to extend time, but the said discretion cannot be exercised arbitrarily".



The reasons given are health problems, negligence of his former lawyer and the distance of residence to the court premises. In proving the health problems, the applicant has brought reports dated 2005, 2006, 2008, 2009, 2011, 2013 and 2014 before the filing of Application No. 109 of 2017 in the District Land and Housing Tribunal of Moshi and Land Appeal No. 25 of 2020 at the High Court of Tanzania at Moshi.

The judgment in Land Appeal No. 25 of 2020 was delivered on 20/11/2020. The applicant has stated in the affidavit, he was aggrieved, he filed this application on 13/9/2021 praying for extension of time to file leave to appeal to the Court of Appeal of Tanzania. Under the rules he ought to have filed the application for leave to appeal to the Court of Appeal of Tanzania within thirty (30) days. The delay was for over eight (8) months. In the case of **Godwin Ndewesi and Karoli Ishengoma vs. Tanzania Audit Co-corporation [1995] TLR 200** it was observed that:

"In order to justify a court extending the time during which some steps in procedure requires to be taken, there must be some material on which the court can exercise its discretion".

The counsel has submitted that in exercising its discretion all relevant factors must be taken into account in deciding how to exercise the discretion to extend time. For the argument he has cited the case of **Mbogo and another vs. Shah [1968] E.A.93**. Factors such as length of the delay, the reason for delay, and degree of prejudice to the defendant if time will be extended are relevant under the circumstances.

The applicant in this case has advanced the reasons of sickness to be the cause of delay. He had to show that he was sick after the judgment in Land Appeal No. 25/2020 was delivered in this court until when he filed this application instead of showing that he was sick even before the filing of application No. 109/2017 in the District Land and Housing Tribunal of Moshi. In their opinion the reason of health problem is an afterthought. He prayed that this court should not entertain it. The counsel for the respondent has an opinion that the applicant slept over his rights only to be awakened by an attempt to execute by the Respondent. The counsel for argued that the applicant did not act with promptitude. He has cited the case of **Zilaje vs Fenbora [1972] HCD** where it was held:

"Court will not readily interfere in order to give remedy where the party seeking such remedy sat on his rights and didn't act with reasonable promptitude".

In conclusion, the respondent's counsel has argued that the applicant has failed to show good cause for delay.

On the second question, the counsel invited this court to answer the question as to whether the applicant accounted for each day of delay? His opinion is that the applicant has failed to account for each day of delay. It is a trite law that upon seeking for extension of time, the applicant has to account for each day of delay. The respondent avers that the judgment in Land Appeal No. 25 of 2020 in this court was delivered on 20/11/2021. The applicant ought to have applied for leave to appeal to the court of appeal

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of Tanzania within thirty (30) days from 20/11/2020 when the judgment of this court was delivered.

That time from 20/12/2020 which date was a deadline to apply for leave to appeal to the Court of Appeal of Tanzania up to 13/9/2021 when this application was filed; it is more than 270 days which has already lapsed; the applicant had to account on each day.

The counsel cited the case of **Nicholaus John Massawe vs. Modest Risha Mushi, Misc. Land Application No. 66 of 2016, High court of Tanzania Moshi (unreported)** in which Madam Justice Fikirini quoted the court of Appeal of Tanzania's decision in the case of **Daudi Haga vs Jenita Abdon Machagu, Civil Reference No. 1/2000 (unreported)** where it was held that:

"it is trite law, the applicant has to account for each day of delay".

The applicant has failed to account on each day of delay. Since he has failed to account for the same, it renders the application baseless with no any merit. He suggested to this court that the remedy is to dismiss this application it in its entirety with costs.

The counsel for the respondent has lastly argued on whether negligence or want of diligence by the former counsel for the applicant is sufficient reason for granting extension of time. In the applicant's affidavit as well as submission, the applicant wants to rely on former lawyer's negligence as a reason for delay. Also, that the applicant works far from the location of the court; he stays at Manyara and the court is at Moshi.



It is the argument of the respondent that the reason of negligence of the attorney is not sufficient for this court to extend time. In the case of **Martha Daniel vs. Peter Thomas Nko [1992] T.L.R. 359** where in His Lordship Mrosso, J quoted a Court of Appeal of Tanzania decision in the case of **Manlidi Hussain vs Abdallah Juma, Civil Application No. 20/1998 Court of Appeal of Tanzania (unreported)** that:

"Negligence or want of diligence by counsel for a party is not sufficient reason for granting leave to appeal out of time".

The Respondent has the opinion that the applicant has delayed due to sloppiness and or inaction; and that cannot be a sufficient reason to extend time. The respondents pray the application to be dismissed with costs.

I have read the record, chamber summons, affidavit and counter affidavit. Also, I have read the submission by the parties. The question at hand is whether this application has merit and therefore it should be granted as prayed. The applicant has delayed to file an application for leave to appeal to the court of Appeal of Tanzania for 270 days. A decision sought to be challenged was delivered on the 20th November, 2020 and this application was filed on 13th September 2021.

In the explanation as to the delay by virtue of paragraphs 5, 6 and 7 of the affidavit, the applicant is alleging sickness, negligence of his former lawyer and working far from Moshi to be reasons of delay. It is unfortunate however; the medical reports shows he was sick before 2014. Though one

report shows he was hospitalized between 12/2/2020 to 28/3/2021 still that explanation is not enough, it leaves a lot of days unaccounted for. That requirement is important for the court to exercise its discretion and extend time.

In the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Association of Tanzania, Civil Application No. 2 of 2010** it was held that:

"It is the discretion of the court to grant extension of time. But discretion is judicial and so, it must be exercised according to the rules of reasons and justice, and not according to private opinion or arbitrarily;

On the authorities however, the following guidelines may be formulated:

- a. The applicant must account for all the period of delay*
- b.*
- c. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take..."*

In this case I find the conduct of the applicant in filing this application, indeed it fits with the reasoning brought forth by the respondent's counsel. Had it been not for the respondent to file an application to execute the decision sought to be challenged by the applicant, the applicant might have

been still seating without doing anything. Though the applicant states that he was aggrieved, he was prompted to file this application by the application to execute filed by the respondent. In a way, I would be right to say that there was inaction on the part of the applicant.

In general, the applicant has failed to account for more than five (5) months of delay assuming he would have acted immediately he was discharged from the hospital on March, 2021.

Under the circumstances, the applicant has failed to account for all days of delay and further to that he did not act promptly and or he acted with sloppiness to pursue his rights. In conclusion, I find this application is doomed to fail and therefore dismiss the same with costs. It is ordered accordingly

DATED and DELIVERED at Moshi this 26th day of May, 2022.




T. M. MWENEMPAZI
Judge

Ruling delivered in court in absence of the parties this 26th day of May, 2022.


T. M. MWENEMPAZI
Judge